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No. 89-1888

In The

Supreme Court of the United States

October Term, 1989

CITY OF SOUTH EUCLID,

Petitioner,

vs.

DAIVA RICHARDSON and RONNIE RICHARDSON,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Ohio

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether South Euclid, Ohio Ordinance 36-86, under which Respondents were criminally prosecuted, is unconstitutionally vague and overbroad under the First and Fourteenth Amendments to the United States Constitution, as the Supreme Court of Ohio, the Ohio Court of Appeals and the South Euclid Municipal Court all agreed.

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DAIVA RICHARDSON and RONNIE RICHARDSON,

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BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents Daiva and Ronnie Richardson respectfully urge that the Petition for Writ of Certiorari seeking review of the judgment of the Supreme Court of Ohio, be denied.

THE OPINIONS OF THE COURTS BELOW AND THE CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS INVOLVED

In addition to the opinions of the courts below and the constitutional, statutory and ordinance provisions cited and set forth in the Petition for Writ ("Petition") which Respondents hereby adopt for purposes of citation, the following statute and ordinance provisions are involved in this case: Ohio Revised Code § 2907.01(A), Ohio Revised Code § 2907.07(B), South Euclid Codified Ordinance § 533.01, South Euclid Codified Ordinance § 533.08, and South Euclid Codified Ordinance § 533.09.

The relevant text of the foregoing additional citations is fully set forth in Respondents' Appendix attached hereto.

STATEMENT OF THE CASE

On October 14, 1986, the City Council of South Euclid, Ohio adopted as an emergency measure Ordinance 36-86. This ordinance has two principal components. First, it creates a first-degree misdemeanor, unique to South Euclid and bearing no relationship to any provisions existing in the state criminal code. This liability provision was passed as an amendment to an existing South Euclid ordinance relating to prostitution and procuring, and provides in full:

> (c) No person, organization, club or association shall own, operate, maintain or manage a brothel or solicit, invite or entice another to patronize a brothel or to engage in acts of lewdness or sexual conduct as herein defined.
>
> (d) Whoever violates this section is guilty of a misdemeanor of the first degree and shall be punished as provided in section 698.02. Petition App.

at A50-A51[1/]

Thus, this liability provision prohibits, among other things, owning, operating, maintaining or managing a "brothel." It should also be emphasized that this ordinance defines the most serious offense within the power of South Euclid to enact - a first degree misdemeanor. A person convicted under this ordinance may be imprisoned for a period of six months and fined $1,000.00.

Second, Ordinance 36-86 has a definitional component which sets forth South Euclid's new definitions of the terms "brothel" and "lewdness," two terms which are incorporated into the criminal

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[1/] The liability portion of Ordinance 36-86 amended § 666.07 of the South Euclid Codified Ordinances, which was subsequently renumbered as § 533.08. Opinion of Trial Court; Petition App. at A-33.

liability provision.[2/] The language chosen by Petitioner to mark the boundaries of this new offense is remarkable, not only because of its exquisitely vague and clumsy wording, but because it purports to regulate the most intimate and private aspects of the lives of the citizenry. These definitions provide:

> "l" "Brothel" means any place, house or dwelling maintained and/or operated by any person, organization, club or association, for the purposes of engaging in group sex, sexual conduct and sexual acts, as herein defined, lewdness or acts of gross and wanton indecency in sexual relations or other sexual activity which corrupts or tends to corrupt the morals of persons in the community.
>
> "m" "Lewdness" means sexual conduct or relations of such gross indecency and so

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[2/] This portion of Ordinance No. 36-86 amended section 666.01 of the South Euclid Codified Ordinances, which was subsequently renumbered as § 533.01. Opinion of Trial Court; Petition Appendix at A-33.

> notorious as to corrupt community morals. Petition App. at A-49-A50.

Thus, although the liability portion of Ordinance 36-86 amended the prostitution ordinance (See Respondents' App. at A3), Petitioner's definition of "brothel" does not conform to the common understanding of the meaning of that term - that is, a "house of prostitution," where a person can receive sexual favors with a prostitute for a fee. Indeed, Petitioner's definition of "brothel" unmistakably constitutes a significant departure from the commonly understood meaning of that word, since the definition does not require that money change hands.

Further, just a cursory glance at these provisions of the ordinance makes it readily apparent that this ordinance cannot be characterized, as the Petitioner argues, simply as a prohibi-

tion against "group sex."[3/] Not only does the language of the ordinance demonstrate that prohibiting "group sex" is not the "core" of Ordinance 36-86, however, but the legislative history of this ordinance soundly refutes Petitioner's present suggestion that the intent behind adopting Ordinance 36-86 was to regulate "group sex." The one document admitted into evidence relating to the purpose for adopting 36-86, "Defendant's Exhibit A," is a verbatim record of the October 14, 1986 adoption of the Ordinance, and provides in full:

3/ In its effort to obtain this Court's review, Petitioner goes outside of the record making erroneous factual assertions about Respondents' "conduct" and misconstruing the rulings of the courts below. Accordingly, pursuant to Rule 15.1, Respondents point out such misstatements where appropriate.

Introduced by Clifford Ordinance 36-86

ORDINANCE

AN ORDINANCE TO AMEND SECTION 666.01, DEFINITIONS, BY ADDING NEW SUBSECTIONS "l" AND "M"; AND TO AMEND SECTION 666.07 PROCURING, AS CONTAINED IN CHAPTER 666, SEX RELATED OFFENSES, OF PART SIX-GENERAL OFFENSES CODE OF THE CODIFIED ORDINANCES OF THE CITY OF SOUTH EUCLID; AND DECLARING AN EMERGENCY.

Moved by Clifford, seconded by DiCillo that Ordinance 36-86 be passed.

Mr. Clifford - "You will recall on your original agenda for this evening, that we had Ordinance 33-86 which is an ordinance providing for indemnification of city officials and declaring an emergency. The reason I mention this, that, this ordinance is very similar and that as part of his duty, and I don't know where he finds the time, but the Law Director has been taking some time at least, to review many portions and sections of our codified ordinances and their definitions and various other things, and this is similar to 33-86 in that the definitions involved were felt to be inadequate and so the Law Director has provided us with Ordinance 36-86. Any comments?"

Law Director DeMarco - "No, this is just as you pointed out, part of my continuing effort to bring up our 'archaic' ordinances. Some of them go back to 1928 which just reading them makes me cringe, because they are not up to date and as you say, from time to time when I run across some of these sections of our code that require attention, I prepare ordinances such as this, and I just want to bring us up to date with the State Code as a matter of fact, in connection with matters of this kind."

Mr. Clifford - "Thank you Mr. Law Director, any other comments? If not I'll call the roll."

Ayes: Cady, DiCillo, Kocevar, Stein, Ungar, Clifford
Nays: None

Ordinance 36-86 has passed.

This contemporaneous legislative history establishes that the City Council considered Ordinance 36-86 to be necessary because of perceived inadequate definitions of a predecessor ordinance, and that Ordinance 36-86 constituted an attempt "to bring [South Euclid] up to date with the State Code," despite the

fact that it bears no resemblance to any provision of the Ohio Revised Code.

Following the adoption of this ordinance, Respondents, a married couple residing in South Euclid, were each charged by complaint on December 30, 1986, as follows:

> Complainant being duly sworn states that Ronnie [and Daiva] Richardson at City of South Euclid Cuyahoga, County, Ohio during the period of time from *** October 16, 1986 through and including *** December 20, 1986, defendant[s] did own, operate, maintain or manage a brothel as defined in Section 533.01(L) (formerly Section 666.01 as amended by Ordinance 36-86) of the Codified Ordinances of the City of South Euclid at 1552 Maplegrove Road, South Euclid, Ohio in violation of Section 533.08(C) (formerly Section 666.07 as amended by Ordinance 36-86) of the Codified Ordinances of the City of South Euclid and against the peace and dignity of the City of South Euclid, Ohio.

See Opinion of Trial Court; Petition App. at A30-A31 (emphasis added). Accordingly, Respondents were charged under Ordinance

36-86 with owning, operating, maintaining or managing a "brothel," where their private home was alleged to constitute a "brothel." Notably, the complaints did not charge Respondents with operating their home to conduct "group sex parties" - in fact, the term "group sex" does not appear once in the complaints - and no bill of particulars was filed by Petitioner. Accordingly, contrary to Petitioner's assertions before this Court, Respondents were never charged with engaging in "group sex," nor is it established anywhere in the trial record that "group sex" was the conduct with which Respondents were charged. Rather, the conduct with which Respondents were charged was the generic crime of operating a "brothel."

Respondents filed motions to dismiss the criminal charges arguing, among other things, that Ordinance 36-86

was blatantly, pervasively and substantially vague and overbroad, and thus was unconstitutional on its face.[4/]

The trial court issued a thoughtful, lengthy opinion striking down the ordinance as unconstitutionally vague and overbroad. Applying the controlling constitutional principles of long-

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[4/] Petitioner never argued before the trial court that this was an ordinance which, at its core, prohibits "group sex," that other portions of the ordinance should be ignored since the "group sex" prohibition was not vague as to Respondents, that the ordinance was never intended to reach, and would not be applied against, married couples engaged in constitutionally protected activity, nor did Petitioner urge a limiting construction of the ordinance. Accordingly, the record is absolutely barren of any factual support for Petitioner's present assertion that "had the trial been allowed to proceed, the evidence would have shown Respondents were operating a facility for group sex by utilizing their South Euclid residence for regularly scheduled group sex parties, charging participants $25 per couple to attend." Petition at 7.

standing, the trial court concluded that the ordinance fails to apprise citizens as to what activities are punishable, see, e.g., Opinion of Trial Court; Petition App. at A37, A39, A42, and encompasses "on its face activities which are, by modern standards, normally innocent so as to be constitutionally protected." Id. at A34; see also id. at A39-A42.

Petitioner appealed the trial court's decision to the Ohio Court of Appeals for the Eighth District which unanimously upheld the trial court's opinion striking down Ordinance 36-86 as unconstitutionally vague and overbroad. Relying on precedent of this Court, the court of appeals concluded that Ordinance 36-86 fails to warn citizens of what conduct is prohibited, fails to provide discernible standards for enforcement, and threatens to regulate and punish

constitutionally protected activity.[5/]

On appeal to the Supreme Court of Ohio, a majority of the court determined that Ordinance 36-86 is unconstitutionally vague and overbroad and adopted the opinion of the court of

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[5/] Contrary to Petitioner's assertions here, at no time did the court of appeals concede, recognize, agree or find that the phrase "group sex" had a commonly understood meaning or that the ordinance was not vague in all its applications (see Petition at 8). Rather, the clear import of the court of appeals' decision is that whatever common meaning the term "group sex" may have, that meaning was irretrievably lost in the context of the ordinance (Opinion of Court of Appeals; Petition App. at A-25). Nor did the court of appeals acknowledge, as Petitioner suggests, that the ordinance was not intended to regulate private sexual relations between husband and wife (See Petition at 9). Rather, in this regard, the court of appeals recognized that the assumption that Petitioner did not intend to regulate sexual activities between married heterosexual couples, would make it impossible to determine what Petitioner did intend to regulate. Opinion of Court of Appeals; Petition App. at A-25.

appeals over the dissent of three justices, all of whom nevertheless agreed that the ordinance "is not a model of clarity." Dissenting Opinion of Supreme Court of Ohio; Petition App. at A12.

Petitioner now seeks review in this Court, arguing that the Supreme Court of Ohio, the Ohio Court of Appeals and the South Euclid Municipal Court all failed to apply proper legal standards in striking down the Ordinance, and that under proper standards, the Ordinance is constitutional.

Thus, Petitioner claims that this case warrants "this Court's immediate review because it presents a needed opportunity to resolve a conflict which has arisen concerning the impact of this Court's decision in Kolender v. Lawson, 461 U.S. 352 (1983) on a facial vagueness challenge and a conflict between the Supreme Court of Ohio and other courts

concerning the proper test to apply in an overbreadth challenge." Petition at 12. No such opportunity, however, is presented by this case.

For, not only is Petitioner's argument premised on factual assertions which find no support in the record of this case, but as Petitioner must concede, the Supreme Court of Ohio did not rely on this Court's decision in Kolender, let alone find that the Ordinance was not vague in all its applications. Nor did Supreme Court of Ohio find that the Ordinance did not pose a real and substantial threat to protected activity.

Rather, after thorough briefing of the issues and oral arguments, the Supreme Court of Ohio rejected the very arguments made by Petitioner here and like the trial court and the court of appeals reached the only conclusion

possible -- Ordinance 36-86 is unconstitutionally vague and overbroad under any applicable standard.

REASONS FOR DENYING THE WRIT

NO IMPORTANT QUESTION IS PRESENTED BY THIS CASE BECAUSE ORDINANCE 36-86 SUFFERS FROM SUCH PERVASIVE AND INCURABLE VAGUENESS AND SUCH SUBSTANTIAL AND REAL OVERBREADTH AS TO RENDER IT UNCONSTITUTIONAL UNDER ANY APPLICABLE LEGAL STANDARD

A. Applicable Legal Standards

It has long been established that a statute, and especially a criminal statute, is unconstitutional on its face if its provisions are so vague and imprecise that persons of ordinary intelligence must guess at its meaning and differ as to its application. Connally v. General Constr. Co., 269 U.S. 385, 391 (1926); Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972); Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971).

This constitutional protection against vague laws recognizes that a country governed by a rule of law rather than a rule of men requires that the average person be given "a reasonable opportunity to know what is prohibited, so that he may act accordingly." Grayned, 408 U.S. at 108.

In addition to requiring that citizens be notified as to what conduct is prohibited, the void-for-vagueness doctrine demands that precise standards be enacted to aid police, prosecutors, judges and juries in applying the law so as to prevent "arbitrary and erratic arrests and convictions." Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972). See also Kolender v. Lawson, 461 U.S. 352, 357 (1983); Colautti v. Franklin, 439 U.S. 379, 390 (1979); Giaccio v. Pennsylvania, 382 U.S. 399, 402-03 (1966).

And, as this Court has recognized, "[w]here a statute imposes criminal penalties the standard of certainty is higher." Kolender, 461 U.S. at 398 n.8. For, where there is the possibility of criminal punishment, ambiguities must be "resolved in favor of the defendant." United States v. Bass, 404 U.S. 336, 348 (1971)).

The doctrine of overbreadth, although related to the void-for-vagueness doctrine, focuses on the potential reach of a statute rather than on its precision. Even if a statute does not suffer from lack of specificity or imprecision, it will be declared unconstitutional on its face if its sweep is unnecessarily broad and if it threatens to ensnare within its web either constitutionally protected activity or otherwise legitimate and innocent conduct. Grayned, 408 U.S. at 114; Zwickler v.

Koota, 389 U.S. 241, 250 (1967); Coates, 402 U.S. at 614.

Petitioner asserts that the state courts erred in failing to review Ordinance 36-86 under the "facts" in this particular case, and for failing to make an express finding that the ordinance's overbreadth is "substantial" or "real." Petitioner maintains that Ordinance 36-86 is unambiguous, and, at its core, it regulates "group sex." In essence, Petitioner suggests that the courts below twisted this ordinance beyond recognition, and then resorted to creating strawmen to declare the Ordinance unconstitutional.

Tested by this Court's precedent, however, it is abundantly clear that the state courts were correct in declaring Ordinance 36-86 unconstitutional, since under any set of imagined facts, Ordinance 36-86 suffers fatally

from imprecision and a total lack of coherency, its sweep is dangerously, substantially and impermissibly overbroad and it delegates basic policy decisions to police officers, judges and juries. Indeed, the list of the Ordinance's defects is virtually endless.

B. The Definition Of "Brothel" And Its Role In Establishing Criminal Liability.

The criminal liability provision in Ordinance 36-86 establishes a new first-degree misdemeanor carrying a potential $1,000 fine plus a jail term of up to six months. This provision, under which Respondents were charged, provides in full:

> No person, organization, club or association shall own, operate, maintain or manage a brothel or solicit, invite or entice another to patronize a brothel or to engage in acts of lewdness or sexual conduct as herein defined.

While this provision has vagueness and

overbreadth problems apparent on its face, as discussed below, the vagueness and overbreadth implications are most prominent when analyzed in light of the provision's incorporation of certain key words. In particular, analysis must begin with the term "brothel," since that is the functioning keystone of the entire ordinance.

1. The Vagueness And Overbreadth Of The Definition Of "Brothel," Taken As A Whole.

"Brothel" is defined in Ordinance No. 36-86 as follows:

> "Brothel" means any place, house or dwelling maintained and/or operated by any person, organization, club or association, for the purposes of engaging in group sex, sexual conduct and sexual acts, as herein defined, lewdness or acts of gross and wanton indecency in sexual relations or other sexual activity which corrupts or tends to corrupt the morals of persons in the community.

Entirely apart from the vagueness of the specific words and

phrases used in this definition, which will be discussed below, the definition in its totality does such violence to accepted rules of grammar and usage as to render the ordinance indecipherable.

First - Structural and Grammatical Defects.

In the first place, "brothel" is defined as a place, house or dwelling operated for certain "purposes." Certainly, South Euclid City Council consciously elected to use the plural "purposes" rather than the singular "purpose." However, the language which follows the word "purposes" identifies at least six separate types of activity, some of which are connected by the conjunctive "and" and others of which are connected by the disjunctive "or." Thus, the definition reads: "operated ... for the purposes of engaging in group sex, sexual conduct and sexual acts ...,

lewdness or acts of gross and wanton indecency in sexual relations or other sexual activity ...." (Emphasis added). Accordingly, one of the first issues which arises upon reading the Ordinance is what conduct or type of activity, or combination of types of activity, meets this definition.

However, a citizen wishing to conform his conduct to the requirements of the law would be unable to discern from this provision what is lawful and what is unlawful, and when certain acts would transform a building or house into a "brothel." The use of the conjunctive "and" in the phrase "group sex, sexual conduct and sexual acts" suggests that there must be a purpose to engage in all three forms of conduct before the Ordinance's prohibitions are triggered. However, the inclusion of the disjunctive "or" twice in the phrase "lewdness, or

acts of gross and wanton indecency in sexual relations or other sexual activity ..." suggests that any one of those three forms of conduct would suffice to trigger the prohibitions of the Ordinance.

This latter suggestion, however, cannot be reconciled with the use of the plural form of "purposes" which informs the citizen that a purpose to engage in more than one of the enumerated forms of conduct is required.

The use of the second "or," found in the last phrase, simply compounds the interpretation problem, since it is not clear what this word is separating. For example, does the use of this second "or" suggest that "sexual activity" in addition to "sexual relations" is modified by the preceding phrase "acts of gross and wanton indecency" - i.e., "acts of gross and wanton indecency in sexual relations or [acts of gross and

wanton indecency in] other sexual activity." In the alternative, does the "or" merely serve to separate two independent activities each of which is proscribed in private homes - i.e., "for purposes of engaging in ... lewdness or ... sexual activity ...?" Again, this is an unanswered and unanswerable question.

In fact, the grammar has rendered interpretation an impossibility and has made guess work or calculating probabilities a necessity. Even when considered in light of Petitioner's inflammatory "factual" assertions, the Ordinance is as vividly vague under that hypothetical set of facts as any other set of facts, since the Ordinance's structure prevents a citizen from knowing with any degree of certainty what acts are prohibited. Addressing this very defect, the trial court commented, "if an ordinance is written in a manner wherein

the interconnection and relationship of the various phrases and portions thereof are so difficult to ascertain, how is a private citizen to be apprised what activities are prohibited and punishable by this Ordinance?" Opinion of Trial Court; Petitioner's App. at A37. On its face, therefore, Ordinance 36-86 is vague under any set of circumstances.

Second - The Missing Definitions.

The Ordinance, in one of its phrases, promises that it will define certain terms used therein. Thus, one part of the definition of "brothel" reads as follows: "for the purposes of engaging in group sex, sexual conduct and sexual acts, as herein defined ...." (Emphasis added). However, that promise goes unfulfilled. While a citizen can find a definition of "sexual conduct" in section 533.01(a), a section of the South Euclid Codified Ordinances which was on

the books before the adoption of Ordinance 36-86,[6] the citizen will search in vain for a definition of either "group sex" or "sexual acts."[7]

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[6] "Sexual conduct" includes "vaginal intercourse between a male and female, and anal intercourse, fellatio and cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal or anal intercourse." See South Euclid Codified Ordinances § 533.01(a); Respondents' App. at A2. This definition precisely parallels the Ohio Revised Code definition of "sexual conduct." See Ohio Rev. Code § 2907.01(A); Respondents' App. at and A1.

[7] The phrase "sexual acts" is not the equivalent of "sexual activity," a term defined in § 533.01(c) of the South Euclid Codified Ordinances. First, both the phrases "sexual acts" and "sexual activity" are used in the definition of "brothel." Second, since the Codified Ordinances draw fine distinctions between "sexual conduct," "sexual contact" and "sexual activity," see South Euclid Codified Ordinances § 533.01(a), (b), (c); Respondents' App. at A2, it cannot be assumed that "sexual acts" was to be used interchangeably with any of these other terms. See Opinion of Trial Court; Petition App. at A38.

What is a citizen who wants to conform his conduct to the law to think when faced with an ordinance that falsely represents to him that certain terms used in the ordinance have special definitions that can be found in the ordinance? How is he to discern the meaning of terms which he is told are defined in the ordinance when, to the contrary, no such definitions are set forth in the ordinance? Such an ordinance simply cannot be squared with the fundamental principle that due process requires penal laws to give a citizen fair warning of its prohibitions. In fact, as the trial court, court of appeals and Supreme Court of Ohio recognized, it is difficult to conceive of a more overt violation of the void-for-vagueness doctrine. Opinion of Trial Court; Petition App. at A38; Opinion of Court of Appeals; Petition App. at A24-A25; Opinion of Supreme Court

of Ohio; Petition App. at A10.

Petitioner argues, however, that the term "group sex" is not vague because it has a common meaning understood by the ordinary person. As an initial matter, Petitioner is simply wrong to suggest that the term "group sex" is self-defining, and the hypothetical set of facts which Petitioner asserts totally outside the record is ideal for illustrating this point.[8/]

Assume, as Petitioner improperly suggests, that Respondents intend

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8/ Moreover, it is disingenuous for Petitioner to suggest that the Supreme Court of Ohio agreed that the term "group sex" was not vague in the context of Ordinance 36-86 (Petition at 9 and 16). Yes, the court did assume for the sake of argument that "group sex" may have a commonly understood meaning, but its opinion clearly concludes that within the context of the ordinance that assumed meaning is irretrievably lost. Opinion of Supreme Court of Ohio; Petition App. at A11.

to conduct sex parties at their South Euclid residence. To determine whether this kind of party is lawful, and to determine how they might conform their conduct to the law, Respondents consult Ordinance 36-86, particularly focusing on the term "group sex." Does "group sex" mean that there has to be at least three people engaged in sex among each other at the same time? If that is the case, would Respondents be shielded from criminal liability if the guests at their party were instructed that they were free to engage in sex with anyone else at the party, as long as there was never more than two people engaging in sex together - i.e., that there could be no "three-somes?" Or, does "group sex" have a different meaning, where Respondents will have exposed themselves to criminal liability if at least two couples, as "twosomes," engage in sexual relations at

the same time? If criminal liability is triggered by this latter example, could Respondents avoid criminal liability by instructing their guests that no couple could have sexual relations in the presence of a third person, but instead must retreat to a private bedroom?

The fact that the term "group sex" is used does not answer those questions. Rather, it is evident that "group sex" is not a precise and unambiguous term and may have different meanings to different people, even when analyzed under Petitioner's own hypothetical set of facts.

More importantly, as the state courts recognized, even if "group sex" did have a commonly understood meaning, Ordinance 36-86 promises that "group sex" has a specific, key definition in this context. However, the promise to provide a special definition goes unfulfilled.

(See e.g., Opinion of the Supreme Court of Ohio; Petition App. at A10 and A11). Accordingly, even if "group sex" is self-defining, which Respondents dispute, Ordinance 36-86 nonetheless is unconstitutionally vague since it represents to South Euclid citizens that, in this context, "group sex" is not self-defining.

Third - The Corruption Of Community Morals Clause.

The concluding language in the definition of "brothel" is the phrase "which corrupts or tends to corrupt the morals of persons in the community." As will be shown below, this corruption-of-community-morals clause alone is such an utterly vague and subjective standard as to render the entire Ordinance unconstitutional. But even apart from this, it is impossible to ascertain what this clause modifies in the disjointed and

clumsy definition of "brothel." Does it modify all six forms of activity set forth in the definition? Or does it modify only the last three forms of activity identified in the Ordinance? Or, for that matter, does it only modify the phrase "or other sexual activity" which immediately precedes the clause in question?

In other words, is it only that type of group sex, sexual conduct, sexual acts, lewdness, acts of gross and wanton indecency and other sexual activity "which corrupts or tends to corrupt the morals of persons in the community" that is prohibited by the ordinance? Or does the moral-corruption clause modify only "sexual activity," the phrase which immediately precedes the clause, so that the other activities set forth in the ordinance such as "sexual conduct" and "sexual acts" are banned even if not of a

type "which corrupts or tends to corrupt the morals of persons in the community?"

The trial court tentatively concluded that this latter interpretation was most plausible. See Opinion of Trial Court; Petition App. at A37-A38. If the trial court's interpretation of this aspect of the Ordinance is correct, and the Ordinance bans "sexual acts" and "sexual conduct" even if not of the type which corrupts or tends to corrupt the morals of persons in the community, then the Ordinance is unquestionably overbroad, because its prohibition would extend to "activities which by modern standards are normally innocent." Papachristou, supra, 405 U.S. at 164. See also South Euclid Codified Ordinances § 533.01(a), (b), (c); Respondents' App. at A2.

The problem is that it is impossible to decipher how and where the

moral corruption clause fits into the definition of "brothel" and what that clause does and does not modify. Instead, the citizen is set adrift to speculate and guess what the Ordinance means. And the potential price of a wrong guess is six months in jail and a $1,000 fine.

Petitioner nevertheless argues that the Supreme Court of Ohio recognized that the Ordinance was never intended to reach married couples engaging in protected activity (Petition at 19). The fallacy of Petitioner's assertion is highlighted by the following passage of the Supreme Court of Ohio:

> [I]f the plaintiff-appellant City of South Euclid did not intend to regulate sexual activities between married heterosexual couples, which we assume it did not, then a reading of the entire definition of "brothel" in Ordinance 36-86 makes it virtually impossible to determine what activities plaintiff-appellant did intend to regulate.

Opinion of Supreme Court of Ohio (emphasis added); Petition App. at A11. Rather than making a finding supportive of Petitioner's argument, clearly the court found that the limiting construction advanced by Petitioner could not cure the Ordinance's unconstitutionality.

In summary, the definition of "brothel" contained in Ordinance 36-86 is so structurally flawed and so grammatically improper that it is nothing more than gibberish. The Ordinance is simply unintelligible, fails to give fair warning of its prohibitions and invites arbitrary, uneven and discriminatory enforcement by policemen, prosecutors, judges and juries. Moreover, since the Ordinance casts a wide net, encompassing constitutionally protected activity, its overbreadth is "substantial" and "real."

2. The Vagueness And Overbreadth Of Specific Key Phrases Used In The Definitions Contained In The Ordinance.

Entirely apart from the structural and grammatical defects in the Ordinance already discussed, several phrases in the Ordinance which are central to its meaning are impossibly vague and overbroad. Thus the definition of "brothel" refers to sexual activity "which corrupts or tends to corrupt the morals of persons in the community."9/ The definition of brothel further refers to "acts of gross and wanton indecency in sexual relations." Finally, the definition of "brothel" also refers to "lewdness," which is separately defined as "sexual conduct or relations of such

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9/ As earlier noted, it is impossible to tell which phrase or phrases this clause modifies.

gross indecency and so notorious as to corrupt community morals."[10/]

These phrases are so nebulous and so loosely worded as to provide no objective standard whatsoever to judge when a citizen has crossed the line separating lawful sexual activity from that which will subject him or her to criminal prosecution and punishment under the ordinance.

Are husbands and wives in South Euclid at risk of criminal prosecution when they engage in sexual intercourse in the privacy of their own homes in some position other than the missionary position? Will husbands and wives in the City of South Euclid go to jail if they engage in oral sex in their bedrooms? Would Petitioner regard that to be an act

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10/ "Lewdness" is incorporated into the liability portion of Ordinance 36-86 as well.

of gross and wanton indecency, or an act which tends to corrupt the morals of persons in the community?

Is it a crime in South Euclid for a woman to use a vibrator for sexual pleasure in the privacy of her own home? Is masturbation in one's own home a lewd act and, therefore, criminal conduct in South Euclid?

Does every unmarrried couple who chooses to live together in South Euclid face six months in jail on the ground that their sexual activity will corrupt the morals of the community? Does the roster of criminals in the City of South Euclid include every couple who engages in premarital sex?

The answers to these questions cannot be found in the Ordinance. By its clumsy and open-ended definition of "brothel," Petitioner completely abdicated its important responsibility of

supplying an objective and ascertainable standards of guilt designed to result in even-handed enforcement of the law. As the state courts agreed, these phrases impermissibly delegate "basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis." Grayned v. City of Rockford, 408 U.S. at 108-09. See also Kolender, 461 U.S. at 357-61. Indeed, it would be an understatement to conclude that persons of "common intelligence must necessarily guess at its meaning and differ as to its application." Connally v. General Constr. Co., 269 U.S. at 391.[11]

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[11] The utter vagueness of Ordinance 36-86 is even more stark when one considers the dilemma a trial court would face in attempting to construct a jury charge for all the various nuances of this ordinance.

Further, because of its potential application, at the whim of a policeman, a prosecutor or a jury, to constitutionally protected, innocent sexual conduct between husbands and wives in the privacy of their homes, Ordinance 36-86 is also substantially and unconstitutionally overbroad.

3. The Vagueness And Overbreadth Of The Phrase "Maintain and/or Operate ... For The Purposes Of."

Ordinance 36-86 defines "brothel" as a house or dwelling "maintained and/or operated" for particular purposes, but fails to define what is meant by this phrase. As a result, serious vagueness and overbreadth concerns are presented. Even were a citizen able to determine what types of activity are encompassed by this ordinance, it is impossible for an ordinary

person to know what percentage of time the listed activities must occur on the premises in order for the premises to be "maintained and/or operated ... for the purposes" of such activities.

Under Ordinance 36-86, is a house or dwelling maintained and/or operated for a purpose or purposes if the prohibited activities occur on the premises a mere .01% of the time? Or, does this definition require that 50% or 100% of the activity occurring on the premises be prohibited activity? The Ordinance does not answer this question. Further, it is not evident how essential the activity or combination of activities must be to the premises' existence in order for it to constitute a "brothel," as opposed to a private residence or office. Does the activity, or combination of activities, have to constitute a primary purpose for which

the home is maintained, or does an incidental purpose satisfy the Ordinance? For that matter, must the purpose be objectively manifested or is a subjective purpose alone satisfactory? For instance, if an individual rents an apartment for the sole purpose of engaging in one form of prohibited conduct listed in the Ordinance, is this apartment a "brothel" even though no prohibited conduct ever takes place on the premises?

Petitioner ignored this serious defect in the ordinance in the state courts, and continues to skirt this issue before this Court. Rather, Petitioner simply asserts that Ordinance 36-86 prohibits the use of a residence for the purpose to engage in "group sex". Petition at 15 (emphasis added). However, the "use" of a building is certainly not equivalent to "maintaining" or

"operating" a building for a particular purpose. And, in any event, even if the Ordinance merely prohibits the "use" of a building for a purpose, it still must be determined to what extent the building must be "used" for that purpose before criminal liability is triggered.

To illustrate the substantial vagueness implications resulting from this total lack of definition, consider applying this ordinance to a married couple, such as Respondents, who purchase a house in South Euclid and proceed to establish their residence there. The couple sleeps there, eats there, bathes there, watches television there and exercises there. In other words, this married couple utilizes or "uses" their residence for all the activities generally associated with private homes. In addition, assume, as Petitioner asserts outside the record, that the couple

engages in some form of "group sex," whatever that term means, twice a month at their house.

While it is obvious that "group sex" cannot be characterized as a primary purpose for maintaining the residence in light of the many other activities occurring on the premises, the Ordinance provides no guidance as to whether this couple has exposed itself to potential criminal liability. It is not clear, for instance, whether the Ordinance instantaneously transforms this private home into a "brothel" when the couple engages in "group sex" once, twice or ten times; or, whether their residence becomes a "brothel" the moment other people are invited to their home to engage in "group sex," but before any prohibited activity occurs; or conversely, whether the married couple is shielded from criminal liability simply because the prohibited

activity does not constitute the couple's main purpose for maintaining the home. By failing to specify objective guidelines for determining when a private home is subject to this transformation process, the Ordinance is unconstitutionally vague. Kolender, 461 U.S. at 357-61; Coates, 402 U.S. at 614; Papachristou, 405 U.S. at 162; and, inasmuch as the Ordinance purports to create "brothels" out of private residences, thereby criminalizing innocent activity, the Ordinance is unconstitutionally overbroad. Grayned, 408 U.S. at 114.

C. Additional Vagueness And Overbreadth Problems Of The Liability Portion of Ordinance 36-86.

1. The Lack Of A Scienter Requirement.

One of the most remarkable aspects of this ordinance is that it

contains no scienter requirement since it fails to require any guilty knowledge or purpose. Specifically, the criminal liability portion of the Ordinance provides:

> No person, organization, club or association shall own, operate, maintain or manage a brothel or solicit, invite or entice another to patronize a brothel or to engage in acts of lewdness or sexual conduct as herein defined.

Thus, even were it possible to decipher the Ordinance's definition of "brothel," criminal liability can be imposed on the owner of the real estate upon which the "brothel" is situated, even though the owner has no knowledge that the premises are being used as a "brothel" by others. Similarly, a person can be convicted of a first-degree misdemeanor for operating or managing a "brothel," without there being an inquiry into whether the person knew that the house or dwelling was a "brothel" or that his or

her activity was unlawful. Ordinance 36-86, therefore, creates a strict liability offense; and, it is important to note that South Euclid made this offense a first-degree misdemeanor, the most serious offense within South Euclid's power to enact, carrying a potential $1,000 fine and a jail term of up to six months. Further, the Ordinance is South Euclid's unique creation, having no counterpart in the Ohio Revised Code or the ordinances of other municipalities.12/

The lack of a scienter requirement clearly exacerbates the Ordinance's imprecision since it has long been recognized "that the constitutionality of

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12/ Although the definition of "brothel" contains the word "purposes," a word generally associated with scienter, the criminal liability provision does not require that a person or association have a purpose to do an illegal act.

a vague statutory standard is closely related to whether that standard incorporates a requirement of mens rea." Colautti v. Franklin, 439 U.S. 379, 395 (1979). See also United States v. United States Gypsum Co., 438 U.S. 422, 434-46 (1978); Smith v. California, 361 U.S. 147 (1959); Screws v. United States, 325 U.S. 91, 101-03 (1945). And, a scienter requirement will not save an otherwise unconstitutionally vague law.

In the instant case, it has already been demonstrated that Ordinance 36-86 is hopelessly vague. Although the inclusion of a scienter requirement would be an ineffective cure for its defects, Screws, 325 U.S. at 103, certainly the lack of a scienter requirement renders it fatally and unconstitutionally vague. Further, since the Ordinance imposes criminal liability upon individuals "without regard to fault," Colautti v.

Franklin, 439 U.S. at 394, thus punishing conduct which is normally considered innocent, the Ordinance's overbreadth is also substantial and real.

2. The Ordinance Regulates Constitutionally Protected Speech.

Ordinance 36-86 makes it a crime for any person to "solicit, invite or entice another to patronize a brothel or to engage in acts of lewdness or sexual conduct." This provision, therefore, creates a first-degree misdemeanor for inviting another person to engage in sexual conduct, clearly reflecting the Ordinance's serious overbreadth implications.

The prohibition against inviting or enticing another to engage in sexual conduct prohibits, by definition, an invitation to engage in vaginal intercourse or oral sex. See South Euclid

Codified Ordinances § 533.01(a) (definition of "sexual conduct"); Respondents' App. at A2. Thus, when applied to consenting adults and particularly to married couples such as Respondents, this provision apparently makes it a crime for a person to ask someone else to engage in intercourse.

In this regard, it is significant to recognize that Ordinance 36-86 does not require a proposal to exchange money for sex as does the traditional crime of "solicitation," which in South Euclid is a third-degree misdemeanor. See South Euclid Codified Ordinances § 533.09.[13] Yet, under Ordinance 36-86,

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[13] Section 533.09 prohibits a person from soliciting another "to engage ... in sexual activity for hire." Respondents' App. at A4. Since "sexual activity" incorporates both "sexual conduct" and "sexual contact," See South Euclid Codified Ordinances § 533.01(c); Respondents' App. at A2, the only significant
(Footnote continued)

an invitation between consenting adults in which no money will exchange hands heightens the crime from a third-degree misdemeanor to a first-degree misdemeanor. Nor does Ordinance 36-86 require that the invitee be offended by the invitation or that the invitor be aware of the offensive nature of his or her invitation. Therefore, this provision is in stark contrast to statutes which punish for inviting another to engage in sexual activity knowing such invitation is offensive to the invitee. See, e.g., Ohio Rev. Code § 2907.07(B) (imposing criminal liability for soliciting "a person of the same sex to engage in sexual activity with the offender, when the offender knows such solicitation is

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difference between solicitation and Ordinance 36-86 is solicitation's requirement of "for hire," which logically would dictate a harsher penalty, rather than a lesser penalty.

offensive to the other person, or is reckless in that regard") (emphasis added); Respondents' App. at A1.

In the instant case, a mere invitation to engage in sexual conduct is adequate to trigger criminal liability regardless of the inoffensive nature of the invitation or the relationship between the parties. This provision, therefore, clearly regulates constitutionally protected speech since such an invitation does not fall within any category of unprotected speech. See, e.g., Beauharnais v. Illinois, 343 U.S. 250 (1952) (libel); Time, Inc. v. Hill, 385 U.S. 374 (1967) (calculated falsehoods); Miller v. California, 413 U.S. 15 (1973) (obscenity); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) ("fighting" words).

That the overbreadth implications of this aspect of the Ordinance are

both "real" and "substantial" is evident from the Ordinance's significant departure from the commonly understood meaning of the word "brothel" and from other solicitation offenses. If the Ordinance was not intended to reach the speech and conduct described above, it is impossible, as the Supreme Court of Ohio recognized, to discern what this Ordinance does regulate. See Opinion of Supreme Court of Ohio; Petition App. at A11. See also, Zwickler v. Koota, 389 U.S. at 250; Coates v. City of Cincinnati, 402 U.S. at 614.

CONCLUSION

Upon the foregoing, clearly all three state courts had ample reason to strike down Ordinance 36-86 on the grounds of vagueness and overbreadth. Accordingly, no important issues are presented by this case and the Petition should be denied.

Respectfully submitted,

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APPENDIX

OHIO REVISED CODE

§ 2907.01 Definitions.

(A) "Sexual conduct" means vaginal intercourse between a male and female, anal intercourse, fellatio, and cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

§ 2907.07 Importuning.

(B) No person shall solicit a person of the same sex to engage in sexual activity with the offender, when the offender knows such solicitation is offensive to the other person, or is reckless in that regard.

SOUTH EUCLID
CODIFIED ORDINANCES

533.01 DEFINITIONS.

As used in this chapter:

(a) "Sexual conduct" means vaginal intercourse between a male and female, and anal intercourse, fellatio and cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

(b) "Sexual contact" means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if such person is a female, a breast, for the purpose of sexually arousing or gratifying either person.

(c) "Sexual activity" means sexual conduct or sexual contact, or both.

533.08 PROCURING.[*]

(a) No person, knowingly and for gain, shall do either of the following:

(1) Entice or solicit another to patronize a prostitute or brothel;

(2) Procure a prostitute for another to patronize, or take or direct another at his or her request to any place for the purpose of patronizing a prostitute.

(b) No person, having authority or responsibility over the use of premises, shall knowingly permit such premises to be used for the purpose of engaging in sexual activity for hire.

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[*] This is the version of § 533.08 prior to the enactment of Ordinance No. 36-86.

533.09 SOLICITING.

(a) No person shall solicit another to engage with such other person in sexual activity for hire.